INDIA ADR WEEK 2023 – DAY 5 DELHI

SESSION 5

INTERSECTION OF ARBITRATION AND INSOLVENCY - THE WORLD PERSPECTIVE

5:00 PM To 6:00 PM

Speakers:

Mr. Naresh Thacker, Partner, Economic Laws Practice
Mr. Amit Bansal, Partner, Financial Advisory, Deloitte Touche Tohmatsu India LLP
Mr. Kiran Sequeria, Managing Director, Secretariat
Mr. Sanjeev Gemawat, Group General Counsel, Vedanta Group
Ms. Yuet Min, Director, Dispute Resolution, Drew & Napier LLC
Mr. Sidharth Sharma, General Counsel, Tata Sons

HOST: Mr. Sidharth Sharma, General Counsel, Tata Sons.

NARESH THACKER: Hi good evening, everyone welcome to this session on I would put it a little differently Arbitration versus Insolvency. I'm always on the side of arbitration. You can take that from me at least. I'm Naresh Thacker. I'm the moderator for the evening. Now let me tell you as a moderator, you don't really get to speak too much. So, I'm going to take a couple of minutes telling you giving you a backstory of how actually I landed up with this panel. This is not a panel that I had chosen originally. I can see quite a few familiar faces in the crowd. And I can tell you all of them are arbitration practitioners. And they are going to ask me this question, why insolvency, so Nish? I'm only on the arbitration side. I've not moved towards insolvency as yet. But... when Niti came up to me, and she said, oh, Naresh, and obviously, when Niti comes and she talks to you, she smiles very, very sweetly. And she said, Naresh, I want you on a panel. And I was like, oh great, she wants me on a panel. So great. I said yes without even thinking and then the topic came up, and it was arbitration, vis a vis insolvency and I was horrified. I said, Niti no, this is not something that I'm going to do. You can't get me on a panel, which is on arbitration and insolvency. I will only be talking half. The other half someone will someone else will have to do it. So, she smiled more sweeter and this time she

tells it, don't worry, I'll make you the moderator. So that's the moral of the story. Always know the management, they can work wonders. With that, let me now start with the introduction of the panel. We have stellar, stellar star cast for you. And I will begin with the introduction in no particular order. But first we must begin with Yuet Min. Well, she is the lady on the panel, and she comes also from outside the country. So as a good host I'll begin with her. She's a Disputes Partner at Drew and Napier in Singapore, handles commercial disputes both in Singapore courts and in arbitration. Particular interest and experience in multilingual proceedings, was a young MCIA Steering Committee Member and has held various positions in the committees within SIAC. She also co-chairs a committee in the ICC Singapore Arbitration group... Arbitration Group. And I have, you know emphasizing on the word arbitration. Welcome to a panel on insolvency with arbitration. Next to me is Sidharth Sharma who is a General Counsel of the Tata Sons. An important man to know for this room. That obviously, as all of you know, Tata Sons is the principal investment holding company and the promoter of the Tata Group of companies. One of the largest Indian business conglomerates. As a General Counsel at Tata, Sidharth heads the in-house group, that's the in-house group legal function and advises the group companies and Tata leadership and senior management team on a variety of legal issues. Next, let me introduce Kiran Sequeria. Kiran, if you can just put your hand up for the audience. Thank you so much. Managing Director at Secretariat where he serves as an expert witness on financial, economic valuation and damages issues and complex economic sorry, complex international disputes. He has provided expert evidence in over 100 commercial and investor state arbitrations, of which over 25 matters involve Indian companies and that's phenomenal Kiran. He has testified in some of the largest and most visible international disputes across the globe, particularly in capital intensive sectors such as energy, infrastructure and mining. Next up, Jagdeep. Seasoned legal professional with diverse professional background, encompassing 16 years of experience serving as in-house Counsel and has experienced working across sectors with Stinson, Hindustan Lever, Ibibo Group and currently he works with the Vedanta Group as Deputy General Counsel. Last and nevertheless Amit, who is disputes and Forensic Dispute... he was a Partner with the Forensic and Dispute Services practice at Deloitte. He leads the Disputes and Litigation Advisory Service and Antitrust services wherein he has worked on over 80 commercial dispute engagements requiring expert intervention in computation of claims, expert assessment of counter claims, delay analysis and construction projects, forensic audit of financial statements and termination of commercial contracts and gathering of evidence and litigation matters. So that's an impressive, impressive panel that we have here. Begin with the questions because we have, as I was told, only 55 minutes to run through all the questions that I have. My first question is to Sidharth. Sidharth, when one of the parties to an arbitration is insolvent, the dynamics of arbitration, as we understand, can significantly change. What is the scope and

impact of a moratorium under the IBC on arbitration proceedings against the corporate debtor? What would happen in such a situation where you have a moratorium under either Section 14 or Section 96 of the IBC?

SIDHARTH SHARMA: Thank you, thank you Naresh, and good evening, everyone. It's my pleasure to be here and I speak not as an expert, but as a member of the legal community. And I know many in the audience. They are experts in the field, so I don't claim any extra expertise. But this topic is interesting. Arbitration law is interesting and insolvency, especially in India is very interesting because it is an evolving subject. I can say despite a very lengthy legislation, detailed legislation it is primarily court driven law, much of the clarifications and how the law has evolved has come through judgments. Now moratorium is again one part of the legislation, which again has been subject matter of debate, ambiguities and inconsistent decisions. I think much of the issues in any branch of law becomes clear if we... Naresh, I'm just taking this preface because in this forum we are not issuing a legal opinion to somebody we don't have to exactly discuss what the law is. I think ideally, we should discuss what the law should be. So, the ambiguity surrounding moratorium provisions in the Indian IBC, I think much of it will be clearer if we look at it from the point of view of what the object of IBC is and put it very, very simplistically. I feel Corporate Insolvency Resolution process is nothing, but a controlled M&A supported by court and a state legislation with one policy objective, which is to keep the business of corporate debtor in business. Because the alternative, which is liquidation, or the corporate debts of the corporate debtor is not a desirable situation for anyone. And that is why it's a chance that one takes at resolving the insolvency and to revive the corporate debtor. Now, if this is the objective, then it's very important that the corporate resolution insolvency resolution is given best chance. And the entire focus of all the stakeholders is on that process. And that is why moratorium is important. Because if moratorium is not there, then it will lead to chaos. Now if we look at it with this perspective then I'm not talking about the cross-border situation where you have an international commercial arbitration. But strictly speaking, within the scope of the Indian law I think any action or proceeding against the corporate debtor has to be state, and the Indian Law is very clear. Three things. You can't Institute, you can't continue, and we can't execute if you have a degree or an award. So, there are different layers within it. What if there is a claim by the corporate debtor but there's a counterclaim by the defendant? I will come to that perhaps in the second round, Naresh. But as things stand in the Bare Act action proceedings against the corporate debtor is covered by the moratorium and which is again, very clear. If we look at the other provision in the same act, which is the moratorium provision, when that kicks in, when resolution has failed, and the corporate debtor goes into liquidation there, Section 33 Subsection 5 of the Indian Law makes it clear

that there the moratorium applies both in relation to action by or against the corporate data. So, while CIRP is on, this is the effect of moratorium under the Indian law. Thank you.

NARESH THACKER: So interesting, as what you put Sidharth, I think there is one clear issue which emerges. In an arbitration here is a party autonomy that you're speaking of as against a collective that you need to protect under IBP and that's the true dichotomy. When you look at arbitration, vis-a-vis insolvency and the question truly always is that how do you resolve this problem? Yuet Min, if I can ask you this question from an international perspective. I think Sidharth spoke about the domestic scenario, and he said that if there is a moratorium in that moratorium, nothing can happen vis-à-vis the company everything comes to a standstill. And the reason why it comes to a standstill is because you need to protect the assets, you need to ensure that there is a positive revival as against liquidation. But let me narrate a hypothetical situation for you and let's understand from an international standpoint how would this work. Let us also agree that there are no reciprocal arrangements between our respective countries on the cross-border insolvency. Now, a corporate debtor is undergoing insolvency proceeding in India. In or around the same time you have an International Commercial Arbitration, which is seated in Singapore. The governing law is, let's say the Singapore law and in that situation the debtor comes to the Singapore Tribunal and seeks stay on the ground that there is a moratorium back home in India. In that situation how would you think that the Tribunal would react? Would the Tribunal grant stay, or would the Tribunal say that nothing doing. I'm going to go ahead with these proceedings. And let me also twist. Give a further twist to it. Assume also the situation that if I take it now, I would want to know the yes or no of why the Tribunal would if they would grant the stay, then what is the reason? And if they would not grant the stay, then what do you think would be the reason why they would do it? And then maybe I'll come with a further twist to that question.

YUET MIN: So, I think my general sense of how this happens, and it happened like only once in the case that I was on. But generally, it's actually quite difficult to stay arbitration proceeding governed by Singapore law. If let's say in the hypothetical, there was an insolvency proceeding in India. There is always a question of how that insolvency proceeding arises. I think there are some questions about that, but generally if there is a valid arbitration agreement, it would generally be very difficult to have to stay an arbitration because of an overseas moratorium or insolvency proceeding. But there are cases where I think we've seen cases where there is a stay. And I think usually that involves public policy reasons if other creditors will be prejudiced then that may be one of the factors that a Tribunal may take into account in staying the proceedings. But I had a case once, long, long ago, and it happened in the middle on the second day of the hearing. The opposing side came, so they have already argued one day. The second day they

came what happened that was not an Indian insolvency proceeding, but they had fought, basically for insolvency proceedings in the US and they basically just said and then they walked out. They walked out basically, they say I have no instructions, I'm going to walk out. So, we did research on the spot to persuade the Tribunal to continue with the arbitration in the absence of the Respondent. And we managed to convince the Tribunal in that case to continue. Of course, this was before the time now this insolvency is such a global action nowadays. So, it may be a bit different now. I think because this happened more than I think about 10 more than 10 years ago when this happened. But I think the general position and I see they are like Singapore experts here. But I think the general position is that it will be quite difficult to stay Singapore arbitration proceeding because of that.

NARESH THACKER: So, we all understand, and we all know that Singapore, as a jurisdiction, supports arbitration and especially if it's an international arbitration, they will go all out and in support of the arbitration proceedings. We've seen that happening in maybe slightly unrelated issue which was Anupam Mittal and they despite the fact that there was an operation and mismanagement proceeding which could have happened in India under the statute, the Singapore Tribunal, the Tribunal first decided to go ahead and then all the way up to the Supreme Court it was held that the arbitration ought to go on. And it ought not to stop merely because there is a statutory bar in India to take it into arbitration. So, my own sense also would be that Singapore will support arbitration and would not on, merely on the basis that there is an insolvency proceeding in India stay anything. I must also put this across. We also do understand one thing very clearly in India that the IBC as an Act applies, if you look at Section 1, it applies only to India. So, it clearly does not have the extraterritorial jurisdiction until and unless there is a reciprocal arrangement. There are two provisions within the IBC Section 234 and 235. Neither of them have been given effective to as of now. The notifications have not neither notifications have come out, nor is there the reciprocal arrangement. So therefore, my thought also would be that the Tribunal will not stop. But let me just twist that scenario a bit. Assume for a moment in the factual scenario that we've spoken about. The Indian courts were to grant a stay, in that situation would the Tribunal honour that stay? If yes, then what would be the consideration? If no, then what considerations, on what considerations they would not honour it?

YUET MIN: Yeah. So that's quite an interesting question. Because I would imagine that I think if parties agree the Tribunal will probably just stay in the proceedings. But there's an issue of enforcement here, because in Singapore, unless there's reciprocal arrangements usually, enforcement is only for money judgments. So, when you have to enforce something that's not a money judgment it's actually not that easy to get that enforced in Singapore, even

if there's an injunction. But coming back to the Anupam Mittal case. Even before, I think recently there was a about two weeks ago it was Indian Court judgment that I think sort of went against the Singapore Decision. But I think even before that if you read the Singapore decision and I think most Singapore practitioners may agree with me that it's actually going to be a very difficult decision to implement. Because if you bring that decision all the way to its logical conclusions you won't be able to enforce that award in India which is probably the place that you're going to enforce it in. So, you come up with a circular problem. So, you may be able to insist on arbitration in Singapore, but it may lead up to future problems of enforcement in the very jurisdiction that you want to enforce in. So, I think and I'm not sure of course, the court appeal judgment is going to be difficult to move away from that. But if you look at the judgment, it distinguished an earlier judgment b and a, distinguished b and a. And if you look at the facts of the two case honestly, I can't really see the difference. But because in that case they went the court went the other way and said that it was PRC. So actually, I'm not sure how far we can take Anupam Mittal. It seems to be a decision that is very difficult to implement. And I'm not sure realistically it is a good decision. My good friend was there, *amicus curiae* in that case and unfortunately disagree with him. I think it's a difficult I think there's not going to be an automatic stay even if there's an Indian court injunction.

NARESH THACKER: Yeah, one thing we all learned from this Singapore experience is that every court across the world, when it comes to jurisdiction their own jurisdiction they do react in a certain manner. And you're right, the decision of PRC, if I am not mistaken, that was paragraph 18 of the judgment and they've reproduced a part of what PRC the facts was and the facts were quite similar to Anupam Mithal. So, what was truly the reason for them to move away from that scenario is I quite don't understand why they...

YUET MIN: I think there was like one paragraph. And then they said that you can see how it is very different. And I'm like, no, I can't really see why it's very different.

NARESH THACKER: And also, the point of enforcement was brought in by...

YUET MIN: Yeah. And even in B and A is the problem because the High Court and the Court of Appeal had different decisions.

NARESH THACKER: Yes.

YUET MIN: It was actually overturned. So, you can imagine how it's very difficult to gauge in these situations which where it's going to go.

NARESH THACKER: Yes. So, moving on, Jagdeep, if I can pick your brains on this issue that what according to you is the Indian view? Does the moratorium that is imposed under Section 14 and 96 act as a bar on the continuation of arbitral proceedings that are seated outside India? If your answer is yes, then why would you think that such a situation ought to arise? And why do you think that the arbitral Tribunal ought to hold its hand?

JAGDEEP SINGH: Thanks Naresh. I think Yuet Min answered it to an extent in terms of the practicality of it. I think in terms of depending upon what positions being taken over here, if the Tribunal decides to just continue with the arbitration. I think they'll be in terms of the practical outcome of it, limited things that anybody will be able to do. But I think she brought out another very important point is that the [UNCLEAR] could just take a call and not participate in the arbitration at all. I think from a practical perspective that becomes very important because even if you get an award, I think the moment you obviously bring it over here to try and enforce it. I think that's where the moratorium anyway is going to kick in. So, I think the resultant outcome is going to be similar in terms of what you achieve out of it. So, I think that practicality of it becomes very, very important in terms of how you deal with it. But I think what Sidharth also mentioned earlier, that I think, and you also mentioned in terms of the applicability of the law, I think because it's anyways, restricting to the territory of India and in terms of this entire continuation of your arbitrations as well. I think it's still something which is developing, but I think we'll have to look at the practical aspect of it in terms of how it will eventually get enforced. So, I think the outcome is going to be eventually very, very similar. I think that's probably how it's going to... unless there are changes and as you said that we have arrangements with other countries in terms of the enforceability and all. I think we'll probably be facing this issue for a little while.

NARESH THACKER: So, Amit and Kiran sorry. Before I come to you guys one question that I want to ask Sidharth. Look at it now from the corporate debtor's perspective. So, would an institution of a moratorium mean that the corporate debtor also should stop all proceedings? Or can he or she continue to initiate or to continue litigating and do whatever is required for the purposes of securing the company's dues?

SIDHARTH SHARMA: No. Obviously, the moratorium is intended to be a shield. And again, going by the object of the Act, the Insolvency Law is to protect the corporate data from onslaught of claims so that resolution applicant which is there in the market who is willing to come and resolve it, take over the company and run it efficiently, is not scared. But the converse is not true. So, actions by the corporate debtor is of course allowed and should be

allowed. But there can be nuances. What if I am the corporate debtor? I make a claim, and, in an arbitration, I have an award in my favour but then the counterparty challenges that award in under section 34 of the Indian Arbitration Act. Now, whether that 34 challenge can continue during the moratorium period or during the CIRP process? Now Delhi High Court has held that it can. And I think that's the correct view, because if a party is taking an action which is pure defensive, when corporate debtor is suing somebody and if that is allowed, then of course, the counterparty is defending itself, and that defence logically should continue to appellate proceedings, which in case of an arbitration it has to lead. It has to extend to the proceedings where an application for setting aside of the award is involved. Because it's just a defensive proceeding. There, there is a paragraph in one of the Supreme Court judgments of the Indian Supreme Court, where it says that the Delhi High Court, what Delhi High Court decided is not the correct law. Section 14 is very clear. Any proceeding has to be stayed during moratorium. But again, with respect, I feel that as a pure student of law, I don't think there is enough discussion in that judgment on this issue. A pure defensive proceeding should be allowed to be continued. The problem arises when corporate debtor sues, and the counterparty makes a counter claim. Now there again the judgments say that it can continue, but the moment the counter claim is allowed, then the moratorium kicks in. So, it's very contextual. It's not hard and fast rule that you switch on the... you put the switch on, and moratorium should kick in, and it should go away a particular event. So, it's very contextual, logical and this is the way it should be. I just had a question. I was just wondering that let's say where a counterparty or a Claimant against the corporate debtor makes a claim in an arbitration which is purely for injunctive relief. Let's say the corporate debtor is in breach of confidentiality obligation or in a joint venture situation the corporate debtor is in breach of non-compete obligations. Whether the counterparty can run to an international arbitration, invoke its emergency arbitration provision and get an injunction even when a moratorium is on or CIRP is on. So, declaratory relief whether that can be considered during moratorium.

NARESH THACKER: That's a very interesting question that you put. And I think there is no, again, no straightforward answer to what you ask. It ultimately to my mind, I don't know what Yuet Min or anyone else on the panel would have a view on this or not, but to my mind again it will all depend on what is the impact of that injunction vis-à-vis the corporate debtor. Because if the injunction, if the impact of the injunction is anything which is financial, and that's the whole purpose of IBC, it's the financial revival of the company. And if it has any financial implication, obviously, this is where the courts will go into the question into this question of understanding what the financial implication is and depending upon that either the injunctive relief will be granted or will be denied. So, can we put it in any straight jacket formula or an answer? I don't think, there is any straight jacket formula or answer. But Yuet

Min or Jagdeep, anyone who on the panel please feel free to add to whatever I have said or to take the question that Sidharth has put forth.

YUET MIN: Actually, I agree. I think, I mean already in Singapore it's unlikely to the starting position is that it's unlikely to have an impact. But I think if what is in arbitration, what is in dispute, is completely non-financial, then I suppose even more so it won't have an impact. And as I was researching, as I say, I'm not an expert in this area. As I was researching the issue I also thought even if the issue is purely arbitrable, and therefore the arbitrary proceeding continued despite insolvency proceedings. Wouldn't there also be a concern about the fact that the company is like spending money on arbitration. But the cost don't seem I tried to look at the cases, but it don't seem to take that into account. I should also add that I think in the Singapore context, I think what some parties do when they can't get the Singapore proceeding stayed is that they then go to court. And I think they get a Singapore court. A Singapore court moratorium, because I think if you fit under the requirements for like, section 64 of the IRDA, you'll get like an automatic moratorium like 30 days. And I think that's within Singapore context, I think the Tribunals will have the respect. Because it's automatic moratorium if you fit within Section 64, I think in restructuring situation.

NARESH THACKER: Okay. So, one interesting point that you also mentioned was that if the counterparty was to seek to challenge the award in a 34 what would happen? My own sense is that in the 36th there so you're right. In the 34, the moratorium should set in. But under 36, the amount ought to be asked to be deposited by the counterparty so that that money can be brought into the corporate debtor company. So, to my mind that is something that should happen. Because otherwise, what's the point? You have an award for the corporate debtor, that award today is challenged. And there is a... the moratorium because of the moratorium, you stop the proceedings of the corporate debtor. But at the same time, if the money does not come in, it does not help.

SIDHARTH SHARMA: But the money has to come in accordance with law. I mean, moratorium is supposed to protect what the corporate debtor has in its kitty. It's not supposed to allow any and every claim of the corporate debtor which it files against anybody. Otherwise, you're killing the defence. So I think...

NARESH THACKER: So somewhere the balance is to be found. You're right. And to my mind under a 36 application and just for everyone's benefit here the application under 36 is made when you are seeking a stay against arbitral award. Now, if this is a counterparty which has challenged an award and it's an award in favour of the corporate debtor, then one thing is

certain that that money needs to be deposited in court. Because even otherwise, like any money decree and we all understand that a money decree needs to be paid. And courts seldom ever grant any relief. More so an injunctive relief. There could be that the corporate debtor could be asked to give some sort of a guarantee. But in this situation more likely not and also likely most likely that the money will be asked to be brought in. But anyway, quickly moving on to our next question and the other two panellists. Kiran, if I can ask of you this question that in situations where an Indian company in insolvency proceeding is also a claimant in an arbitration. How does the parallel insolvency proceeding impact the arbitration proceeding from both the causation and damages perspective?

KIRAN SEQUERIA: Thanks, Naresh, for the question and pleasure to be here alongside my co panellists. I should say, I should preface my response by saying that my comments are informed by my experience in international arbitrations, where one of the parties is an Indian party that is also in an insolvency proceeding. And I think what makes the damages assessment somewhat different in these cases is that it needs to be preceded by what I would call a causation analysis, where you need to evaluate what would be the financial position of the Claimant but for the alleged breach, right? If you're in a contract dispute to be but for the contractual breach. But if you're in an investor state arbitration, it's but for the breach of the BIT or public international law and so I think that's oftentimes not a simple analysis, right. You could be in situations where let's say there's a breach of contract, and the supplier simply stopped supplying your raw material. There's no substitute raw material. And so, in those cases you could pretty easily but for that breach, you would be continuing to operate. But many a times it's far more complicated. There are competitive pressures. There is over... companies over leverage, there's too much debt. And on top of that, you have a breach of the counterparty. And in those situations, I think you really have to carefully model and stimulate what would have happened to this company, but for that breach. And the reason it's important is because the damages methodology is very different if you are valuing a company on what we call is a going concern basis, assuming you would continue to operate and generate cash flows versus value a company when it is insolvency, where it's either proceeding into restructuring and resolution or going to liquidation. Those situations, the value can be substantially lower. And so I think the answer to the question is really it's a two-pronged kind of process in these types of cases, where the first step is to assess kind of causation from a financial perspective, to determine whether the company would be insolvent or not, but for the breach and based on that determination that would inform the damages methods you use. For example, if you are going to be a going concern, you would use a discounted cash flow or a market approach. But if you're going into insolvency, then it may be either liquidation value or a restructured company with a new capital structure that you'll be using to value the company.

AMIT BANSAL: So, Naresh, I'll just like to add here and let me cavate myself in terms of I'm not an IBC expert, but I kind of work more as a financial expert and I'm talking of a live example where we are currently working on. And this is a large infrastructure company which has multiple projects and one of the projects happens to be disproportionately large and where the concession agreement has been terminated. So, it has a disproportionate financial impact on the overall company. Now we have a situation here that if, let's say that there is an arbitration which is already on. The client has already got the first award in its favour, which is for the delay site, which means the delay has already been established. However, the situation of the company, such as the prime candidate for bankruptcy now for filing bankruptcy. Now this is a situation where they have to take a decision whether to continue to fight the arbitration or to file for bankruptcy. And the lenders are supportive of the company. They are actually seeing that situation that yes, whatever the company has been telling us is a live situation. However, it's a very difficult decision. And they are taking our assistance to kind of say how much is a possible claim which can come so that they can take a decision whether they should actually go for bankruptcy or continue with Arbitration.

NARESH THACKER: I take it that you are being paid for the work that you're doing despite this difficult situation that the company finds itself.

AMIT BANSAL: We have been appointed [UNCLEAR] that's why.

NARESH THACKER: So, Amit, I'll stay now with you. I can ask a question that… can a party in an arbitration proceeding file a claim in the Corporate Insolvency Resolution process? Is it possible?

AMIT BANSAL: The party is the counterparty, one of the…

NARESH THACKER: Yes.

AMIT BANSAL: So, because, the moratorium will kick in while they are welcome to file the claim, but if the claim happens to be on the disputed facts very, very unlikely that the resolution professional will admit it. However, if there is a claim which is beyond the disputed items, which is in the routine nature, that is something which the resolution professional may look at and subject to verification they may admit it.

NARESH THACKER: Okay, just for our understanding, what you're saying is that if it is something that is already a part of the arbitral process and would require some sort of an adjudication by the Tribunal that is not something that one can bring before the IRP and the IRP will therefore look at everything else but that claim. Jagdeep, if I can ask a related question. We moved ahead now, and we have an arbitral award. Question is that does such an arbitrary award, or a decree qualify as a debt? And what is the nature of the debt? Is it operational? Is it financial? And therefore, basis which if you were to take it before the IRP how would he... what sort of treatment would he or she give to it?

JAGDEEP SINGH: I think two things over here. I think I'll also distinguish between one just filing a claim before the IRP and Secondly, to actually being able to initiate the IBC proceedings as well. I think let's look at that as well. I think as Amit rightly mentioned, I think in terms of filing the claim, all those factors will be taken into account. In terms of your specific question, in terms of the award being there and whether they can use it to file the claim. Anyways, if you look at it from foreign award perspective, I think it's important that it will first have to be brought into India, get enforcement done, and then only it will become debt. And that's the position which has been laid down now. So, as long as it is disputed, it will not be considered a debt. And therefore at least from your position of being able to initiate the proceedings or file a Section 9, I think that's where it will not be possible till you are able to conclude that process. And in terms of filing of claim, as Amit mentioned, it will depend upon a lot of factors. To give your answer to your other question in terms of what kind of debt it will be? I think that will again be dependent upon the circumstances in terms of your dispute whether it's an operational creditor or a financial creditor, and depending upon which is the counterparty over there, and what kind of debt it will eventually get considered. So, I think that's how that bit will get considered. But I think you'll have a slight difference in terms of how it will be considered whether you are initiating the IBC process, or you are just filing a claim. I think initiation will become a lot more difficult for a party who's having just the award and it's not really done in enforcement or rather not converted into a decree as such in India.

NARESH THACKER: So yeah, I think from the perspective of whether this is a financial a debt is a financial or operational debt, especially when you have an award or a decree in front of you. I think the question becomes more nuanced and maybe more complex when it can be given either of the treatments or it has an element of both. Then the question is, does the entire debt become an operational debt or a financial debt? Obviously from the creditors' perspective, they would always want it to be a financial debt. Because in terms of the waterfall mechanism you stand way up and then, but as an operational creditor, you're not going to get anything. So, one is going to look to place it always in the financial debt category. But it's always going

to be a nuanced argument. And I do not think on most occasions whatever the IRP decides, to my mind it is always going to land up in the NCLT and then it will be left to the NCLT to decide what is the nature of what is the nature of the debt? But Kiran would you have any comment on this?

KIRAN SEQUERIA: Yeah, I think it's a tough one. Because if you look at the question is do you pierce the veil of the award and understand how that damages was calculated right? Because you can have an award as you can think of an award made up of sort of different pieces. They may be recovery of past receivables or dues which one could perhaps consider as a financial debt. But then you've also got other elements, working capital changes in other operational issues that you think of that also contributes to the damages claim that may be an operational debt. So, the question becomes, does the Trier of the facts, break into the damages award and assess how those claims were calculated, or they treat the entire award as just one asset, so to speak, and then label it as one or the other. And like you said, I think that discretion would lie with the NCLT and how they construe that award.

NARESH THACKER: Sidharth, coming back to you. This is a question which I think usually is there in the minds of everyone when you see a corporate resolution process that a company undergoes. Does a resolution plan provide the company with a *clean slate*? Is now, all sins wiped out and I am as what I don't know if anyone here would understand it, but if I was in Mumbai, this is a very easy thing to explain what the Jains usually do every year. They go through a process, and then they would tell each other *Micchami Dukkadam*, which means that I wipe out all my sins and I begin once again on a *clean slate*. So, is that what it means, or would it mean something else?

SIDHARTH SHARMA: I think from resolution applicant's point of view, *clean slate* has to be there. I had read after the financial crisis of 2008 there's a very good book, 'Too big to fail' and there is a chapter, the whole Lehman Brothers collapse and everything. And there is one where the author has explained what happened when Lehman filed for bankruptcy. And in the Bankruptcy court Barclays put in the bid $1.75 billion for the whole North American operations of Lehman. And many creditors opposed it. It's written that the proceedings went late into the night and at midnight the judge approved the plan. The so-called bid and he said that I am approving this plan, not because it is the best plan, but it is the only plan available. IBC is not to give everything to what is due to everyone. And corporate debtor is like melting ice cube. Every day the value is chipping away. So, you have to close it quickly. And what is a resolution plan? In simple terms, again, resolution plan is nothing but a contract, an offer to contract which an applicant gives to the COC that on these terms, I want to acquire this

company. And once that plan is accepted by the Committee of Creditors, it is approved by the Tribunal, the insolvency court. Then the plan has to be the Bible. Then if you keep uncertain claims, if you burden the resolution applicant with future claims, even though the plan says that all prior claims shall stand extinguished, then where does it end? No resolution will ever take place. And this happened mostly in cases of tax claims. And I can say it with experience because when we acquired Bhushan Steel. When Tata Steel acquired Bhushan Steel through the IBC process everything was there. Plan said that all claims relating to period prior to the CIRP shall stand extinguished we are not liable. But still we got different tax claims from different state government, income tax. And one by one, one by one we fought, and we have got favourable orders. And Supreme Court clarified in Ghanshyam Mishra judgment, where they approved this *clean slate* principle. Because you can't have no contract can have an uncertain consideration or unlimited consideration. If resolution applicant doesn't get a *clean slate* after the approval of the plan, then where does the process end? So, I am a big votary of this. Recently there have been some Supreme Court judgments which have tried to disturb this principle. Rainbow industries where Tax claims were... Supreme Court said that they will have priority because under the tax law they have a charge. And therefore, Supreme Court tried to give that priority. Thankfully, that has been corrected. Rainbow is under review but in a different judgment. I forget the name of the judgment. But Justice Ravindra Bhat has said that no it can't be because, once you have a concept of waterfall, there is an inherent inequality in the system. And that is the reality of the business. Financial creditor, secured creditor will have priority. Financial creditors will have a claim when they approve a resolution plan. And therefore, a resolution applicant tries to fulfil that demand first and therefore, it has to end somewhere. And that is what *clean slate* principal affirms and should be affirmed. Thank you.

NARESH THACKER: Good that you mentioned that I remember the time when there was no IBC and we all used to file all the winding up petitions. And usually, the winding up petitions would stay within the Indian court system for a very very long time. And in between you'll have the tax guys come in and say, but I have the first charge. And everything would be disturbed and courts in India, usually unfortunately, many times they become like recovery agents. Some courts would say that okay if it's a PSU or if it's a tax authority, and then in that case and if they have the first charge and I remember cases, one of the old matters of Punjab National Bank versus one of the companies. And it was a customs case. And PNB as we know it came in to say that, but I hold the first charge. And therefore, in the waterfall mechanism, whatever the statute provides becomes immaterial, because contractually I hold the first charge, and therefore I should have the first right of call on the asset of the company. So, yeah, you're right. Now at least there is enough and more clarity in the system. So Yuet Min, if I can very quickly come to you. We all understand that an insolvency process is not to be you don't

go down the insolvency process just because you need to enforce your award. That's not the process. And that's how the courts in India look at anything which is brought in by way of insolvency, especially if you are trying to enforce your arbitral award. So, the courts would usually tell you that that's not the method, there is another method of enforcement, as one understands. So how would you say that the Singapore courts would maintain equilibrium in a scenario where you need to balance out the equities on both sides. On the one side. You have an arbitral award, a person who holds an arbitral award, he seeks to enforce it, and the counterparty does not follow through. And on the other hand, there are allegations to say that but there is a dispute vis-à-vis this very award. How would the Singapore courts maintain such an equilibrium?

YUET MIN: So, I don't think it's the case where if you come to court and just say that I need to wind up or anything like that. The court will just allow it or anything in that thing. But I think there are certain safeguards put in place. The debtor will still have to show a certain bona fide of what they're trying to say. So, you have to prove a certain bona fide. And if let's say debt, is I suppose debt passes the threshold then the court may also still get a certain undertaking. I think that's what sometimes it happens. They get a certain undertaking from debtor, even if they allow the claim to go on. There's a certain undertaking and then the winding up proceedings sort of like revives itself at the end. So that there's some protection for the creditor as well. That's how I understand that the courts sometimes do these things. So, there's some discretion to how they manage these situations to balance I suppose the rights of both the creditor and the debtor. I'm not sure whether similar things are done in Indian courts.

NARESH THACKER: So, I wouldn't say that it is similar or identical. As I said, the courts would ultimately give its own consideration as to whether it's an abuse or process per se that is how the courts would look at the issue rather than the manner in which you put it. But clearly, if the courts find that this is an abuse of process and what the award holder is seeking only to do is to enforce its debt through a circuitous route by trying to come under the insolvency process, then clearly such a petition would not be would not be entertained. Well, I have just a minute and Kiran, I'm going to come to you. Unless there are questions from the audience, I do have a question for Kiran. But if there are any questions, we're happy to take it. Well not really, we've covered everything well. But anyway, I do have a question for Kiran. Kiran, can you very briefly comment on how damages expert should go about undertaking a causation and damages analysis for the purposes of an arbitration claim?

KIRAN SEQUERIA: Yeah, of course. Thanks. So, I would say, as I mentioned earlier, that in these situations where you have a parallel insolvency proceeding, the causation analysis is

important. But the causation analysis has three I see three legs. There is a financial assessment, which we as damages experts do. But there's also legal and factual issues that affect the outcome of causation. And so, I think the goal of the damages experts is to really give the Tribunal a roadmap on how to navigate those issues. And ideally you want to entertain the positions of both Claimant and Respondent? Because oftentimes they're both legal and factual disputes between the two parties. So the tendency sometimes is to just take your view of your party that appoints you if you're a Claimant expert and just model out the legal and factual position of your client and provide the Tribunal with an answer. But I think the risk there is that if there is a different finding of on liability or on the disputed facts, you're not leaving the Tribunal with any meaningful alternative. And so, I think the key point is to identify those different scenarios, one based on Claimant's, legal and factual position and one based on the Respondent's legal and factual position. Do a separate causation analysis on both those sorts of assumptions. And based on the determination of that causation analysis, where you find out whether you're going to be insolvent or not insolvent in this counterfactual world where there's no breach, you would accordingly do a damages analysis for those different outcomes. So that the Tribunal can kind of say, okay, based on their findings, there is an according there's sort of a decision tree or a roadmap for them to get to an answer on damages.

NARESH THACKER: So, thank you so much Kiran, and with that I think we'll come to an end. The time's up. Neeti is sitting here is not looking very happy with the fact that we are 1 minute up beyond. 4 minutes beyond time. But to me it's just one anyway. But thank you so much for being such a patient audience. We have had an excellent discussion. We enjoyed it. A round of applause for my panellists. Thank you.

~~~END OF SESSION 5~~~